



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/174289

PRELIMINARY RECITALS

Pursuant to a petition filed May 12, 2016, under Wis. Admin. Code, §DHS 10.55, to review a decision by the MY Choice Family Care to change petitioner's Family Care Program eligibility, a hearing was held on June 2, 2016, at Milwaukee, Wisconsin, with the parties appearing by telephone.

The issue for determination is whether the agency correctly determined petitioner's level of care following a reassessment.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

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Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
MY Choice Family Care
901 N. 9th St.
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a 77-year-old resident of Milwaukee County.
2. Petitioner has been eligible for Family Care. The agency conducted an annual rescreen on May 3, 2016. Following the rescreen the agency was informed that petitioner no longer met the nursing home level of care. By a notice dated May 3, 2016, the agency informed petitioner her level of care was changed from nursing home level of care to non-nursing home level of care.
3. Another functional screen was done on May 17, 2016. The results were essentially the same.

4. The functional screeners found that petitioner needed assistance with activities of daily living (ADLs) bathing and dressing, and instrumental activities of daily living (IADLs) meal preparation, laundry/chores, and transportation.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

Wis. Admin. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate; I note here that Wis. Stat., §46.286, uses the terms “nursing home” and “non-nursing home” levels just as the agency in this case. If the person meets the comprehensive (nursing home) level, she is eligible for full services through a managed care organization (MCO), including Medical Assistance (MA). Wis. Admin. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, she is eligible for full services only if she is in need of adult protective services or she is financially eligible for MA. Wis. Admin. Code, §DHS 10.36(1)(b). A person eligible under the non-nursing home level is eligible for less FCP services.

Wis. Admin. Code, §DHS 10.33(2)(c) describes comprehensive functional capacity:

(c) Comprehensive functional capacity level. A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
 - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Wis. Admin. Code, §DHS 10.33(2)(d) describes intermediate functional capacity:

d) *Intermediate functional capacity level.* A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:

1. One or more ADL.
2. One or more of the following critical IADLs:
 - a. Management of medications and treatments.
 - b. Meal preparation and nutrition.
 - c. Money management.

ADLs include bathing, dressing, eating, mobility, and transferring. Wis. Admin. Code, §DHS 10.13(1m). IADLs include meal preparation, medication management, money management, laundry and chores, telephone, and transportation.

The Department has developed a computerized functional assessment screening system. The system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience). The screener asks the applicant, or a recipient at a periodic review, questions about his or her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the Functional Screen Report for the person to the Department's Division of Disability and Elder Services. The Department enters the Long Term Functional Screen data into a computer program to see if the person meets any of the required levels of care.

What occurred here is an ongoing problem with the level of care determinations for the FCP. Several years ago the Department decided to tighten up the screening process because it appeared that people were being determined to meet nursing home levels of care when they did not actually require nursing home levels. The functional screens were changed to make the determinations more accurate in the Department's estimation. In this case the major change between petitioner's 2015 and 2016 screen was in the determination of risk of institutionalization. In 2015 the risk was level 2; in 2016 it changed to level one.

The problem with the changes, however, is that the legal, binding definitions of comprehensive (nursing home) and intermediate (non-nursing home) functional capacities found in the Wisconsin Administrative Code have not changed. Therefore, although the functional screening process now puts petitioner at the non-nursing home level, the Administrative Code definition puts her at the nursing home level. §DHS 10.33(2)(c)2 puts a person at the nursing home level of care if she is unable to perform two ADLs and one or more IADLs. Petitioner is unable to perform bathing and dressing without assistance, and she also is unable to perform three IADLs. Therefore, despite the functional screen determinations, I must conclude that petitioner remains at the nursing home level of care, and her current FCP services also should continue.

CONCLUSIONS OF LAW

Petitioner remains at the nursing home level of care for FCP purposes because she needs assistance with two ADLs and three IADLs.

THEREFORE, it is

ORDERED

That the matter be remanded to the FCP agency with instructions to change petitioner's level of care determination back to nursing home, and to restore her FCP status to its level prior to the determination at issue in this case. The agency shall do so within 10 days of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 9th day of June, 2016

\sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on June 9, 2016.

MY Choice Family Care
Office of Family Care Expansion
Health Care Access and Accountability